RECENT DECISIONS.

ADMINISTRATIVE LAW—COMMISSIONS—NOTICE OF MEETINGS. The State constitution gave to a board of three complete control of the State prison. Two members held a meeting without notifying or attempting to notify the other member. *Held*, action taken at the meeting was valid. *Akley* v. *Perrin* (Idaho, 1905) 79 Pac. 192.

When a public commission is given quasi judicial functions, the weight of authority seems to be that it cannot act judicially unless reasonable diligence has been used to notify all the members of the meeting. *People* ex rel. *Loew* v. *Batchelor* (1858) 28 Barb. 310; *Smyth* v. *Darley* (1849) 2 H. L. C. 789; see also 1 Dillon Mun. Corp. 4th ed. § 262. The purpose of creating the board was to give a hearing to diverse opinions, and this purpose would otherwise be thwarted. *School Dist. No. 42* v. *Bennett* (1890) 52 Ark. 511; but see contra, *Beall* v. *State* ex rel. *Strange* (1851) 9 Ga. 367.

ADMINISTRATIVE LAW.—DISMISSAL OF POLICEMAN BY THE POLICE COMMISSIONER. The relator, a policeman, had been charged with violating certain rules of the police department. The charges were heard by one of the deputy police commissioners, who made an oral report to the police commissioner. The latter found the relator guilty and dismissed him from the force. *Held*, that, as the proceedings were quasi-judicial and not judicial in character, a formal report by the deputy police commissioner is unnecessary in order to give the police commissioner, who had taken no part in the hearing, authority to convict and punish the accused, under Laws of 1901 c. 33; City Charter, secs. 270, 300, *People* ex rel. *Garvey* v. *Partridge* (N. Y., 1905) 73 N. E., 4.

The jurisdiction of a statutory quasi-judicial tribunal is determined by the statute creating it. *People* ex rel. *De Vries* v. *Hamilton* (1903) 84 N. Y. App. Div. 369. The police commissioner by virtue of the New York City Charter, supra, has the authority to regulate his own procedure and punishments. *People* ex rel. *Reardon* v. *Partridge* (1903) 86 N. Y. App. Div. 310. Until the decision in the principal case the different Departments of the Appellate Division have been inclined to review the findings of the police commissioner and to reverse them if the procedure was irregular or if in the opinion of the court the finding was against the weight of evidence. *People* ex rel. *Reardon* v. *Partridge*, supra; *People* ex rel. *Hoffmann* v. *Partridge* (1904) 93 N. Y. App. Div. 473. But the Court of Appeals, in the principal case, has settled the law of New York in accordance with the general rule that the determination of a quasi-judicial tribunal made bona fide is not reviewable by the courts. 5 COLUMBIA LAW REVIEW 52.

ADMIRALTY-JURISDICTION. A libel was brought for injuries done to a beacon in Mobile Bay by a ship. *Held*, that even though the beacon was attached to the land, and therefore technically land, admiralty would take jurisdiction over the libel. *The Blackheath* (1904) 195 U. S. 361. See NOTES, p. 312.

AGENCY—REAL ESTATE BROKER—RIGHT TO COMMISSION. The defendant employed the plaintiff, a broker, to procure a purchaser for some real estate on commission. The broker found a purchaser satisfactory to the defendant and a binding executory contract for the sale of the land was

executed. Later the proposed purchaser refused to perform on the ground that the defendant's title was defective. *Held*, the broker was entitled to his commission. *Bingham* v. *Davidson* (Ala. 1904) 37 So. 738.

In order to be entitled to his commission a broker must procure a purchaser who is able, willing, and ready to buy at a price satisfactory to the principal. *Bir. Land & Loan Co.* v. *Thompson* (1887) 86 Ala. 146; *Kock* v. *Emmerling* (1859) 22 How. 69. The principal may say whether the proposed purchaser fulfils these requirements, but if, in the absence of fraud or concealment on the part of the broker, the principal accepts the proposed purchaser, and they enter into a binding contract to sell, the principal is held to have waived all other conditions. *Kalley* v. *Baker* (1892) 132 N. Y. 1, 28 Am. St. Rep. 542, and note; *Shainwald* v. *Cady* (1891) 92 Cal. 83. Though the sale falls through thereafter the broker is entitled to his commission, whether the default is due to a defect in the title of the principal; *Knapp* v. *Wallace* (1869) 41 N. Y. 477; to the caprice of the vendor; *Kock* v. *Emmerling* supra; the wilful act of the proposed purchaser; *Kelley* v. *Phelps* (1883) 57 Wis. 425; or the insolvency of the proposed purchaser. *Francis* v. *Baker* (1890) 45 Minn. 83.

AGENCY—RECOVERY OF SECRET PROFITS. The defendant, as agent of the plaintiff to negotiate a loan from certain bankers, procured it, at the same time receiving a commission from the bankers, part of which was paid in cash, and the remainder to be paid under a written contract out of certain insurance premiums as they fell due. The plaintiffs sued to recover the entire profit of the agent. *Held*, that the defendant must account to the plaintiff for the money received; but, as to the contract, the plaintiff's only right was to compel the agent to account for the money he collected under it as it fell due. *Powell & Thomas* v. *Evan, Jones & Co.* [1905] 1 K. B. 11. See NOTES, p. 319.

ATTORNEY AND CLIENT—IMPROVIDENT STIPULATIONS. In an action for libel the plaintiff's attorney entered into successive stipulations with the defendant's attorney for a year's extension of the time within which he might serve his complaint; the stipulations contained also the following provision: "the defendant to have the same amount of time in which to answer or demur to the complaint, when the same shall be served, as the plaintiff has had altogether in which to serve the complaint." After the above extensions of time had been granted by the defendant the plaintiff obtained an order of substitution and his substituted attorney refused to be bound by this provision. *Held*, the court will not relieve the defendant from such stipulations. *Morris* v. *Press Publishing Co.* (1904) 90 N. Y. Supp. 673.

An attorney has exclusive control of the suit and may enter into stipulations in regard thereto; thus he has authority to stipulate for a discontinuance but not to release the cause of action itself. *Barrett* v. *Third Ave. R. R. Co.* (1871) 45 N. Y. 628, 635. The court may relieve a party from stipulations entered into by his attorney, *Barry* v. *Mut. Life Ins. Co.* (1873) 53 N. Y. 536, but the exercise of this power is discretionary and the party seeking relief must show that the stipulation was entered into under a clear mistake, or was procured by fraud, imposition or collusion. *Becker* v. *Lamont* (1855) 13 How. Pr. 23. None of these elements existing and the sole ground for asking relief being the carelessness of the attorney, the courts have been prone to refuse it. So in an action for personal injuries a stipulation by the defendant's attorney that the cause of action should survive the death of the plaintiff, was upheld. *Cox* v. *N. Y. Cent. & H. R. R. Co*, (1875) 63 N. Y. 414. If, as in the principal case, the stipulation has been acted upon it seems unjust to allow the party who has had the benefit to escape performance on his part. *Mark* v. *City of Buffalo* (1881) 87 N. Y. 184; *Mut. Life Ins. Co.* v. *O'Donnell* (1895) 146 N. Y. 275. One

who hires an incompetent attorney should not cast the burden of his irresponsibility upon his opponent. *Foster* v. *Wiley* (1873) 27 Mich. 244.

BANKRUPTCY—EFFECT OF PART PAYMENT AFTER THE BEGINNING OF PROCEEDINGS AGAINST JOINT OBLIGORS. The bankrupts were indebted jointly and severally in the amount of £10,000 by reason of a breach of trust. After the beginning of proceedings, the creditors, under an order from the court released one joint obligor on his payment of £2,000. *Held*, they may still prove the entire £10,000 against another obligor's estate, he being insolvent. *Edwards* v. *Hood-Barrs* [1905] 1 Ch. 20.

The case is in line with the weight of authority. It is now settled in England and the United States that proof may be had both jointly and severally on a joint and several obligation. Ex parte *Nason* (1880) 70 Me. 363. The doctrine of election was abrogated by statute in England in 1869 and never obtained in the United States. The general rule in bankruptcy is that proof may be had and dividends paid for the amount for which a judgment or decree might have been obtained in court at the time of the bankruptcy. Lowell on Bankruptcy, § 193. Therefore if a composition is made with one of the several obligors before proof, the creditor can prove only for the balance. *Cooper* v. *Pepys* (1741) 1 Atk. 106. But if, as in the principal case, composition is not made until after claim entered, then the creditor is not limited to the balance but may prove for the whole sum. Ex parte *Wildman* (1750) 1 Atk. 108.

CARRIERS—LIMITATION OF LIABILITY. In a suit upon a contract limiting the carrier's liability to the invoice value, it was *held* that the sale of the consignment for more than its given valuation did not preclude a recovery and that the damages should be estimated by the ratio existing between the invoice and the actual value. *U. S. Express Co.* v. *Joyce* (Ind. 1904) 72 N. E. 865.

A carrier may limit its common law liability for negligence to the valuation given by the shipper, *Hart* v. *Penn. R. Co.* (1884) 112 U. S. 331, but a sale subsequent to the damage for more than the invoice value does not prevent a recovery. *Staines* v. *R. R.* (1892) 91 Tenn. 516; see *The Lydian Monarch* (1885) 23 Fed. 298. As a carrier's duty of care is dependent upon the value of the goods, unless misled by the shipper, *Dunlap* v. *S. S. Co.* (1867) 98 Mass. 376, it would seem that the former should be liable for damages proportionate to the invoice value in a special contract though not in proportion to the actual value. *Goodman* v. *M. K. & T. R. R.* (1897) 71 Mo. App. 460; *R. R.* v. *Lesser* (1885) 46 Ark. 236, contra *Brown* v. *S. S. Co.* (1888) 147 Mass. 58.

CONSTITUTIONAL LAW—POLICE POWER—DESTRUCTION OF PROPERTY UNLAWFULLY USED. A statute was passed directing certain police officers to remove and forthwith destroy any fish nets found in unlawful use. Subsequently a statute was passed allowing recovery from the State for such destruction if the former statute were unconstitutional. *Held*, the former statute was constitutional. *State* v. *French* (Ohio, 1905) 73 N. E. 216. See NOTES, p. 313.

CONSTITUTIONAL LAW—POLICE POWER—TRADE REGULATIONS.—A statute was passed, requiring horseshoers in cities of certain classes, to pay a fee and pass an examination before being allowed to pursue their trade. A penalty was provided for a violation of the act, and the petitioner having been arrested for such violation, brings a writ of habeas corpus. *Held*, the act is not a legitimate exercise of the police power, and is unconstitutional. In re *Aubry* (Wash. 1904) 78 Pac. 900.

In deciding what matters are subject to police regulation the courts have held that whatever concerned, in a proper way, the welfare or safety

of society was subject to such regulation. 1 COLUMBIA LAW REVIEW 405, 3 id. 280, 4 id. 299. The power has been carried very far where the public health was involved. *City of Taunton* v. *Taylor* (1874) 116 Mass. 254; *Raymond* v. *Fish* (1883) 51 Conn. 80. It has also been applied in cases where the sale of liquor was regulated, *Kettering* v. *City of Jacksonville* (1869) 50 Ill. 39, and was even held to extend to the regulation of the occupation of plumbing. *People* v. *Warden of City Prison* (1895) 144 N. Y. 529. It is not possible to fix an absolute line, for the question will depend more or less on the facts of each particular case.

CORPORATIONS—LEASE—RIGHTS OF MINORITY STOCKHOLDER. The defendant corporation, being in financial difficulty, with the consent of ninety-nine per cent. of its stockholders leased its railroad to another corporation for 999 years, at a rental of seven per cent. of its capital stock and an agreement that its shareholders be allowed to subscribe to the lessee corporation. The plaintiff, a minority stockholder, after subscribing for stock, sued to have the lease declared void on the grounds that the defendant corporation had no power to lease, and that in fact the transaction was a conveyance in fraud of the stockholders. *Held*, (1) that plaintiff was estopped from attacking the lease; (2) that the corporation had power to lease, and as no bad faith was shown, the transaction was only a lease and not in fraud of the stockholders. *Wormser* v. *Met. St. Ry. Co.* (1904) 98 N. Y. App. Div. 29.

Under the general laws of New York, railroad corporations have the power to lease their roads. Act of 1839 p. 195, c. 218; N. Y. R. R. Law, § 98, Laws of 1890, p. 1106, c. 505; *Woodruff* v. *Erie Ry. Co.* (1883) 93 N. Y. 609. Such leases are made by the directors with the consent of two-thirds of the stockholders, § 78 R. R. Law, supra; see *Beveridge* v. *N. Y. E. R. Co.* (1889) 112 N. Y. 1, and where no bad faith is shown the minority stockholder cannot object. *Flynn* v. *Bklyn City R. R. Co.* (1899) 158 N. Y. 493, 507; Morawetz on Private Corps. 2nd ed., §§ 1124, 417.

CORPORATIONS—POWERS OF DIRECTORS. The directors of the defendant company engaged the plaintiff to publish notices apprizing the shareholders of a scheme by which the defendant and another company were to exchange the stock held by the members of the respective corporations. In an action on the contract the corporation pleaded lack of authority in the directors to make such a contract. *Held*, they were not only authorized to notify the shareholders, but it was their duty. *Rascover* v. *American Linseed Co.* (C. C. A., 2nd Cir., 1905) 32 N. Y. Law J. 1380.

Directors are the general or managing agents of the corporation, *Gillis* v. *Bailey* (1850) 21 N. H. 149, and are subject to the rules of agency equally with the agents of individuals. Morawetz on Corps., 2nd ed. §§ 509, 577. While their powers are broad and general, they are limited to those expressly given by the charter, delegated by a majority of the stockholders, Taylor on Private Corps., 4th ed., § 613, or implied as necessarily incident to carrying on the ordinary business of the corporation. They may borrow money without express authority when necessary in the regular course of business, *Curtis* v. *Leavitt* (1857) 15 N. Y. 9 (1859) 19 N. Y. 209, and they may mortgage lands as security for bonds, *Hendee* v. *Pinkerton* (1867) 14 Allen 381; but they can effect no fundamental changes in the corporation which they are not expressly authorized to make. Thompson on Corps. § 3979. An increase of stock where the charter provided that such might be done by the corporation has been held to be beyond their authority. *Chicago City R. Co.* v. *Allerton* (1873) 18 Wall. 233. In the principal case the exchange of stock seems to have heen only remotely incidental to the regular business for which the charter was granted, and the decision seems near the border line.

CRIMINAL LAW — DISCHARGE ON RECOGNIZANCE — REVOCATION — JURISDICTION. The defendant having been arraigned before the Court of Special Sessions of New York City, pleaded not guilty, and was discharged on his own recognizance. More than three years later the discharge was revoked, the trial resumed and the defendant convicted. *Held*, two judges dissenting, that the conviction was proper, for assuming that the lower court had no authority to so discharge the prisoner, the effect of that order was not an acquittal. *People* v. *Harber* (1905) 91 N. Y. Supp. 571.

This decision violates the general view that in matters of review the jurisdiction of an inferior court must appear affirmatively upon the record, Black on Judgments § 270; *Kenney* v. *Greer* (1851) 13 Ill. 432, a rule heretofore consistently followed in New York. *Handshaw* v. *Arthur* (1896) 9 App. Div. 175. In *People* ex rel. *Lotz* v. *Norton* (1894) 76 Hun, 7 a court of special sessions was held to have lost jurisdiction where a change of magistrates was made during the trial, although with the consent of both parties. On the same theory where a warrant was issued by a magistrate returnable to himself and the case was then sent to another magistrate for trial the latter acquired no jurisdiction although he would have had jurisdiction originally. *People* v. *McLaughlin* (1901) 57 N. Y. App. Div. 454. Inferior courts are held strictly to the exact statutory jurisdiction, and a reversal was granted where a case was adjourned two weeks, when the code provided a period of eight days. *Moore* v. *Taylor* (1903) 88 N. Y. App. Div. 4.

CRIMINAL LAW—FAILURE TO FURNISH MEDICAL ATTENDANCE TO A MINOR—COMMON LAW. The defendant, the head of a religious sect, stood in loco parentis to a boy of fifteen, a member of the same sect. Through neglect to furnish medical attendance and food during the child's sickness the child died. The defendant believed that such treatment of disease was not efficacious and that prayer and fasting was the correct method of treating disease. He failed, however, to do either. No statute of the State made the furnishing of medical attendance necessary. The defendant was tried on a charge of manslaughter. *Held*, that inasmuch as whether the defendant's neglect to pray caused the death of the deceased was not a competent question for the jury, the defendant must be excused. *State* v. *Sandford* (Me. 1905) 59 Atl. 597. See NOTES, p. 315.

CRIMINAL LAW — FORGERY — INTERPRETATION OF STATUTE. The defendant was indicted for uttering the following false and forged letter: "To any employee: Western Union Telegraph Co.—This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any favors shown him will be duly appreciated by the corporation and myself. Very truly, J. B. Van Everey, 2d Vice-President." *Held* under Pen. Code, § 514, subd. 3, the defendant was guilty. *People* v. *Abeel* (1904) 91 N. Y. Supp. 699.

Such letters at common law were not subjects of forgery; *Foulkes* v. *Comm.* (Va. 1843) 2 Robinson 836; but only writings which if valid would impose some legal liability or be of some legal efficiency. Bish. Crim. Law, § 533; *Rex* v. *Ward* (1725) 2d Ld. Raymond, 1461; *Case of Ames* (1823) 2 Me. 365. So also under statutes less comprehensive than that in New York. *Waterman* v. *People* (1873) 67 Ill. 91. The principal case presents a liberal interpretation of a statute supplying a defect in the common law.

CRIMINAL LAW—INDICTMENT—ESTOPPEL OF DEFENDANT TO OBJECT. The defendant, as a County Commissioner, drew up a jury list and certified to its correctness although it was in fact wholly irregular by reason of his malfeasance. A grand jury drawn from the list found an indictment against the defendant, who when arraigned before the District Court objected to the indictment on the ground that the grand jury was

not legally constituted. This objection being overruled the defendant took a writ of prohibition to the Supreme Court. *Held*, the defendant was estopped from setting up a defense based on his own wrong doing. *State* v. *District Court* (Mont. 1904) 78 Pac. 769. See NOTES, p. 318.

EVIDENCE—PREJUDICIAL ERROR. The defendant was indicted for the murder of the witness's husband. At the trial the witness was permitted to testify, over the defendant's objection, "I have one child, and I am now pregnant." *Held*, the testimony; although irrelevant, was not prejudicial and its admission was not a reversible error. *People* v. *Rimieri* (1904) 180 N. Y. 163.

Testimony which has a "tendency to excite passions, arouse prejudices, awaken sympathies, or warp or influence the judgment of the jurors in any degree" is harmful, *Anderson* v. *R. R. Co.* (1873) 54 N. Y. 334, and to admit it is error, *Penn. R. R. Co.* v. *Roy* (1880) 102 U. S, 45; Bishop New Crim. Pro. § 1053, even though it is immediately stricken out and the jury instructed to disregard it. *People* v. *Davey* (1904) 179 N. Y. 345. But testimony undistinguishable in nature from that in the principal case has been held harmful. *Smith* v. *R. R. Co.* (1904) 177 N. Y. 379; *Austin* v. *Bartlett* (1904) 178 N. Y. 310. In both criminal and civil cases, where the evidence is simply incompetent and not harmful, or the witness is incompetent to testify, the admission will not constitute reversible error, if aside from that a case is unquestionably made out. *People* v. *Gonzales* (1866) 35 N. Y. 59; *King* v. *Ball* (1807) Russell and Ryans Cr. C. 132; *Herford* v. *Wilson* (1807) 1 Taunt. 12; *Doe* v. *Tyler* (1830) 6 Bing. 561. This last principle seems to have been lost sight of in a recent case before the Court of Appeals, where, in a prosecution for forgery, otherwise clearly proved, irrelevant evidence was introduced to show motive, itself immaterial. *People* v. *Gaffey* (1904) 90 N. Y. Sup. 706. It is not clear how, under the conditions, such testimony could be harmful. The whole matter is always one of judicial discretion, and the decisions are irreconcilable on given states of facts.

EVIDENCE—RAPE—OTHER OFFENSES. On a trial for rape, the prosecutrix was permitted to testify, over the defendant's objection, to two other like offenses, between the same parties. *Held*, such evidence is admissible, not to prove the offense charged, but as corroborative testimony and as showing the relation and familiarity of the parties. *State* v. *Lancaster* (Idaho 1904) 78 Pac. 1081.

Unlike the general strict rule as to showing crimes other than the one charged, 2 COLUMBIA LAW REVIEW 39, in the case of sexual crimes other offenses may be proved, whether occurring before, *Com.* v. *Bell* (1895) 166 Pa. 405; *Hicks* v. *State* (1889) 86 Ala. 30; contra, as to rape, *Parkinson* v. *People* (1890) 135 Ill. 401; or after the act charged, *Funderborg* v. *State* (1887) 23 Tex. App. 392; contra, *State* v. *Hilberg* (1900) 22 Utah 27, but the other offenses must be between the same parties, *Cargill* v. *Com.* (1892) 93 Ky. 578; *People* v. *Stewart* (1890) 85 Cal. 174; and the state must designate the particular offense charged, *People* v. *Castro* (1901) 133 Cal. 11. In an early case where a witness was impeached, the evidence was admitted as corroborative, *Com.* v. *Merriam* (1833) 14 Pick. 518; but later, impeachment was declared unnecessary. *State* v. *Wallace* (1838) 9 N. H. 515. While the corroborative idea seems to underlie most of the decisions, an early case, *Gardner* v. *Madeira* (1799) 2 Yeates 466, followed later, *People* v. *Jenness* (1858) 5 Mich. 305; *Hicks* v. *State* supra; *People* v. *Castro*, supra, justifies such evidence as showing the "immoral proclivities" or "adulterous disposition" of the accused. But this view seems directly in conflict with the rule excluding evidence that tends merely to show that defendant is "criminally inclined."

EVIDENCE—TESTIMONY IN REGARD TO A CONTRACT WITH DECEASED PARTY—SECTION 829 CODE OF CIVIL PROCEDURE. In a suit by a child against the estate of his putative father to recover on a contract made for his benefit by his mother with such father it was *held* that the mother of the plaintiff was the person through whom he derived his interest within the meaning of § 829 of the N. Y. Code of Civil Procedure, and that therefore she was incompetent to testify as to the contract. *Rosseau* v. *Rouss* (1904) 180 N. Y. 116.

This case is an extension of the Code section as applied to witnesses not a party to the action, *Connelly* v. *O'Connor* (1889) 117 N. Y. 91, and practically overrules the former decisions in regard to beneficiaries under a contract. *Bouton* v. *Welch* (1902) 170 N. Y. 554. The result, however, seems consistent with the retention of the doctrine of *Dutton* v. *Poole* (1674) 2 Levinz's 211, see *Shepard* v. *Shepard* (1823) 7 Johns. Ch. 57, and the extension of *Laurence* v. *Fox* (1859) 20 N. Y. 268; see *Buchanan* v. *Tilden* (1899) 158 N. Y. 109.

INSURANCE—EXEMPTION CLAUSE—DEATH IN VIOLATING THE CRIMINAL LAW. The insured had assaulted A but was retreating to avoid the affray when A shot him. It was *held* that death under such circumstances was not within a clause exempting the company from liability in case death should be received in violating a criminal law. *Sup. Lodge K. P.* v. *Bradley* (Ark. 1904) 83 S. W. 1055.

The test in such cases is whether or not the violation of the law was the proximate cause of the death. The courts of Nebraska and Massachusetts have refused to allow the exemption in favor of the company unless the insured was actually committing the crime when killed. *Griffin* v. *West. Mut. Ass'n.* (1886) 20 Neb. 620; *Cheff* v. *Mut. Ben. Ins. Co.* (1866) 13 Allen 308. Missouri will not free the company from liability unless the slayer was justified on grounds of self defense. *Harper* v. *Phœnix Ins. Co.* (1854) 19 Mo. 506. The better rule would seem to be that adopted in New York, which merely requires that such a relation be shown between the act and the death that the latter would not have occurred at the time, had the deceased not been engaged in the violation of law. *Murray* v. *N. Y. Life Ins. Co.* (1884) 96 N. Y. 614; *Gretzman* v. *Conn. Mut. Life Ins. Co.* (1875) 3 Hun 515.

INSURANCE—PROVISIONS OF LIMITATION. A life insurance policy contained the provision that no suit should be maintained thereon, unless begun within one year from the death of the insured. *Held*, such a clause is in contravention of public policy and void. *Union Cent. Life Ins. Co.* v. *Spinks* (Ky. 1904) 83 S. W. 615.

The decision in the principal case is against the overwhelming weight of authority, *Farmers' Mutual Fire Ins. Co.* v. *Barr* (1880) 94 Pa. St. 345; *Johnson* v. *Humboldt Ins. Co.* (1878) 91 Ill. 92, and is open to criticism. Statutes must be construed in the light of the common-law. At common-law there was no limitation, and nothing in the act forbids parties from making their own limitation within the prescribed time. Provisions like the above are almost universally recognized as reasonable conditions precedent and given effect. *Riddlesbarger* v. *Hartford Ins. Co.* (1868) 7 Wall. 386.

MASTER AND SERVANT—CONTRACT RELEASING LIABILITY. The plaintiff while in the employ of the defendant received injuries due to the negligence of the latter. *Held*, that a contract releasing the employer from liability, though for a good consideration, is void as against public policy. *Johnson* v. *Fargo* (1904) 90 N. Y. Supp. 725.

This is a step in advance of any previous decision in this State. A similar result reached in *Purdy* v. *R. W. & O. R. R.* (1891) 125 N. Y.

209, was based on lack of consideration. In *Kenney* v. *N. Y. C. R. R.* (1891) 125 N. Y. 422, the contract was overthrown because of the absence of express words releasing liability. In Alabama, such a stipulation, being in contravention of statutory provisions, was discredited as opposed to public policy. *Hissong* v. *R. & D. R. R.* (1890) 91 Ala. 514. The English courts, notwithstanding the existence of the employers' liability statutes, permit a servant to contract away his claim for compensation in such a case. *Griffith* v. *Earl of Dudley* (1882) 9 Q. B. Div. 357. This right is also recognized in Georgia. *W. & A. R. R.* v. *Strong* (1874) 52 Ga. 461.

PERSONAL PROPERTY—OYSTER BEDS—OWNERSHIP. The defendant was rightfully possessed of a tract of land, granted by the State for the cultivation of oysters. The plaintiff, believing part of it to be his own, dumped upon it oyster shells, to which floating oyster spat attached itself, oysters maturing therefrom. *Held*, the defendant was liable in conversion for appropriating these oysters. *Vroom* v. *Tilley* (1904) 99 N. Y. App. Div. 516.

Although the operations were under a statute, Laws of N. Y. 1887, c. 584, the decision is placed on common law principles. Fish, the term including oysters, *Caswell* v. *Johnson* (1870) 58 Me. 164, are animals feræ naturæ; Bracton II. c. 1, s. 2; *R.* v. *Hundson* (1781) 2 East P. C. 611; *Brinkerhoff* v. *Starkins* (1857) 11 Barb. 248; *Treat* v. *Parsons* (1892) 84 Me. 520; and property in such is acquired by possession only. 5 COLUMBIA LAW REVIEW 241; *Sutter* v. *Van Derveer* (1888) 47 Hun 366; Moore's Hist. and Law of Fisheries 191. But unlike game, oysters having no power of locomotion, need not be under the control of the owner, nor on his land to be in his possession. If a bed be properly placed and marked in the public waters of the state, a property in the oysters vests in the planter, *Decker* v. *Fisher* (1848) 4 Barb. 592; Moore's Foreshore 164, which is as absolute as that in domestic animals or inanimate things. *State* v. *Taylor* (1858) 3 Dutch. 117; *Grace* v. *Willets* (1888) 50 N. J. L. 414. It attaches, seemingly, when the oysters are first appropriated, and is lost by direct abandonment or an act equivalent, *Shepard* v. *Leverson* (1808) 1 Pen. 391, but not by merely placing or planting them on the land of another. *Davis* v. *Davis* (1902) 72 App. Div. 593: but see *Brinkerhoof* v. *Starkins* supra. But in all these cases the owner's first possession was obtained rightfully. In the principal case, the plaintiff planted no oysters; he, as a trespasser, merely deposited shells on the land, and so trapped such spat as was floating over the land. Possession acquired by a trespasser gives no title. 5 COLUMBIA LAW REVIEW 241.

PLEADING AND PRACTICE—GENERAL ALLEGATIONS—PROOF OF SPECIFIC DISEASE. The plaintiff was injured by the defendant's truck. She alleged in her complaint that she sustained many contusions of the body and limbs, was made sick and sore and that her nervous system received a severe shock, which injuries she believed would be permanent. *Held*, that the only allegation that was general was that her nervous system received a severe shock and that under this she could not allege locomotor ataxia, as it was not the necessary and natural result of such a shock. *Wilkins* v. *Nassau Newspaper Delivery Express Co.* (1904) 90 N. Y. Supp. 679.

Such damages as are not the natural and necessary result of the injury complained of must be specially alleged; *Kleiner* v. *Third Avenue R. R. Co.* (1900) 162 N. Y. 193; *Ackman* v. *Third Avenue R. R. Co.* (1900) 52 N. Y. App. Div. 483; though it has been held that proof of specific injury under general allegations is not reversible error where the defendant allowed previous evidence to the same effect to be given without objection. *Ramson* v. *Met. St. Ry. Co.* (1903) 78 N. Y. App. Div. 101. In *Tobin* v. *Village of Fairport* (1890) 12 N. Y. Supp. 224, the plaintiff was allowed under similar circumstances to show "usual or expected results," a relaxation of the rule not in line with the weight of the decisions.

REAL PROPERTY—DETERMINATION OF WHAT CONSTITUTES SURFACE WATER. A depression of two thousand five hundred acres was permanently covered by water to a depth of from three to six feet, without any flow, and supplied entirely by surface water. It was dotted with islands and covered with vegetation. The defendant, owner of a large tract of the submerged land, drained the same, thus drawing off the water from the plaintiff's land, and destroying his fisheries. *Held*, the water was not distinguishable from surface water, and the defendant therefore had the right to drain it away. *Applegate* v. *Franklin* (Mo. 1904) 84 S. W. 347.

The criteria for determining what is surface water are not well defined. This decision regards as surface water a permanent and substantial body of water, a result believed to have been reached for the first time. *Railroad Co.* v. *Brevoort* (1894) 25 L. R. A. 527, note; *Carr* v. *Moore* (1903) 119 Ia. 152; *Brandenberg* v. *Zeigler* (1901) 62 S. C. 18. A pond of four and a quarter acres, fed solely by surface water, five feet deep, and overflowing during only six or eight weeks of the year, was held to be governed by the law of water courses. *Schaefer* v. *Marthaler* (1886) 34 Minn. 487. Water covering five hundred acres of cypress brake supplied entirely by surface water, overflowing through a small bayou, was held to be a lake. *Alcorn* v. *Saddler* (1888) 66 Miss. 221. Mere marsh water is surface water. *Curtiss* v. *Ayrault* (1871) 47 N. Y. 73. The fact that this body of water was a menace to health, that is, a nuisance, influenced the decision in the principal case.

REAL PROPERTY—LANDLORD AND TENANT—COVENANT FOR QUIET ENJOYMENT. The defendant leased to the plaintiff premises partly built under the street by a license from the City of New York which owned the fee therein. Subsequently the city granted the use of the street for the purpose of a subway and the plaintiff was evicted. *Held*, the defendant is not liable for a breach of his covenant for quiet enjoyment, since the plaintiff was chargeable with knowledge that the defendant was a mere licensee and took the lease at his peril. *Pabst Brewing Company* v. *Thorley* (1904) 32 N. Y. Law J. 1707.

A covenant for quiet enjoyment merely insures against disturbances due to defects in the lessor's title. *Coddington* v. *Dunham* (N. Y. 1873) 45 How. Prac. 40; *Knapp* v. *Marlboro* (1861) 34 Vt. 235. Since it does not cover premises to which the lessor notoriously claims no title, *McLarren* v. *Spalding* (1852) 2 Cal. 510, an eviction of the lessee by the owner is no breach of the lessor's covenant. *McLarren* v. *Spalding*, supra. And likewise had the lessor in the principal case owned the entire premises and the lessee been evicted by the city under its police powers, *Connor* v. *Bernheimer* (N. Y. 1875) 6 Daly 295, or its right of eminent domain, *Frost* v. *Earnest* (Pa. 1839) 4 Wheat. 85, such eviction would have been no breach of the lessor's covenant.

SURETYSHIP—BAIL BOND—LIABILITY FOR APPEARANCE ON CHARGE OF DIFFERENT OFFENSE. The defendant executed a bail bond conditioned that G should appear and answer the charge of homicide, and that he should at all times render himself amenable to the orders and process of the court. The charge of homicide was dismissed by the grand jury, but before the formal cancellation of the defendant's bond, an indictment for perjury was found against G on the charge that he had sworn falsely before the coroner. Upon G's non-appearance to answer the latter indictment, the defendant's bond was ordered forfeited, and judgment entered against her. *Pernetti* v. *People* (1905) 91 N. Y. Sup. 210.

A man's bail are jailers of his own choosing. Hawk. P. C., b. 2, c. 15, § 84; *Champlain* v. *People* (1848) 2 N. Y. 82. The bond may be general, expressly, *Gildersleeve* v. *People* (1850) 10 Barb. 40, or by use of the words ad respondendum, *Queen* v. *Ridpath* (1713) 10 Mod. 152; and is interpreted strictly against the obligor. *Champlain* v. *People*, supra; *Queen* v.

Ridpath, supra. But if the bond is special there should be no obligation beyond its terms. *State* v. *Young* (1868) 20 La. Ann. 397; *State* v. *Stephens* (Tenn. 1852) 2 Swan. 308. The indictment must be for the offense charged, *Gray* v. *State* (1869) 43 Ala. 41; *People* v. *Sloper* (1867) 1 Idaho 158, and in the case of a pending indictment, the condition applies only to the particular indictment mentioned. *People* v. *Fenton* (1860) 36 Barb. 429. The condition has been held to cover a charge for a different offense, differing merely in degree, and arising out of the same transaction. *Gresham* v. *State* (1872) 48 Ala. 625; *Com.* v. *Teevens* (1887) 143 Mass. 210. The principal case, however, on analogy between a sheriff and a surety on a bail bond, holds the obligor where the offense charged did not arise out of the same transaction as the offense declared in the bond. See Hawk. P. C., b. 2, c. 15, § 84, and dicta in *People* v. *Gillman* (1891) 125 N. Y. 372, and in *Gildersleeve* v. *People*, supra.

TORTS—FALSE IMPRISONMENT—MEASURE OF DAMAGES. A servant of the defendant caused the unlawful arrest of the plaintiff by a constable. The defendant's servant also made a complaint against the plaintiff before a magistrate, who detained him until the following morning. In an action for false imprisonment, the defendant was *held* liable for damages, both for the arrest and for the unlawful detention by the magistrate as the direct result of the servant's acts. *Knickerbocker Steamboat Co.* v. *Cusack* (1905) 32 N. Y. Law J. 1571. See NOTES, p. 316.

TORTS.—LIABILITY OF ELECTRIC COMPANIES. A fireman was killed by the metallic corner of his ladder coming in contact with a poorly insulated wire of the defendant company. *Held*, the company was under no duty to insulate its wires for the protection of fireman. *New Omaha, etc. Electric Co.* v. *Anderson* (Neb. 1905) 102 N. W. 89.

An owner is under no duty to keep his premises in safe condition for firemen, who enter as bare licensees. *Buhler* v. *Daniels* (1894) 18 R. I. 563. An electric light company is under a liability commensurate with the dangerous element with which it deals. *Sub. Elec. Co.* v. *Nugent* (1896) 58 N. J. L. 658. This duty extends to those who approach the wires in the course of business or as of right, *Perham* v. *Portland Gen. Elec. Co.* (1898) 33 Ore. 451; *Schweitzers Adm.* v. *Cit. Gen. Elec. Co.* (Ky. 1899) 52 S. W. 830, on the theory that the insulation of the wires is an implied representation that they are safe, *Griffin* v. *United Elec. L. Co.* (1895) 164 Mass. 492. Of late years the tendency has been to increase the duty of electric companies, *Geismann* v. *Mo. Ed. Elec. Co.* (1902) 173 Mo. 654, 5 COLUMBIA LAW REVIEW 169, but as yet it has not been extended to impose so broad a duty as was sought to be imposed in the principal case.

TORTS—NUISANCE—PRIVATE ACTION TO ABATE. The defendants had erected a bridge over a navigable stream whereby the plaintiff was prevented from carrying on a steamboat business. It was *held* that no navigation whatever having taken place since the bridge was built, the plaintiff could show no special damage and the action would not lie. *Thomas* v. *Wade* (Fla. 1904) 37 So. 743.

There is authority for the position that damage different in kind as well as in degree from the public injury must be shown in such a case. *Houck* v. *Wachter* (1870) 34 Md. 265; *Steamboat Co.* v. *Railroad Co.* (1888) 30 S.C. 539; *Blackwell* v. *Old Colony R. R.* (1877) 122 Mass. 1. The basis of this rule was the expediency of avoiding multiplicity of suits. But there are many instances where a private action has been entertained against a public nuisance upon allegations of specific or personal damages. *Rose* v. *Groves* (1843) 5 M. & G. 613; *Brown* v. *Watson* (1859) 47 Me. 161; *Powers* v. *Irish* (1871) 23 Mich. 429; *Milarkey* v. *Foster* (1877) 6 Ore. 378. The facts in the principal case bring it clearly within this last class.

TRUST—CONVEYANCE TO AVOID TAXATION. Where a father took a mortgage running to his son for the purpose of avoiding taxation, and the property was deeded to the son in lieu of payment, it was *held* that the father could maintain a bill asking for a reconveyance by the son. *Monahan* v. *Monahan* (Vt. 1904) 59 Atl. 168. See NOTES. p. 317.

TRUSTS—GIFT CAUSA MORTIS—DELIVERY OF A CHECK. The deceased in anticipation of death delivered a check to the petitioner as a gift causa mortis. *Held*, the delivery of the check was a valid and enforceable gift causa mortis though the check was not presented for payment until after the death of the donor. *Phinney* v. *State* ex rel. *Stratton* (Wash. 1904) 78 Pac. 927.

In general, every kind of personal property capable of actual or constructive delivery may be the subject of a valid gift causa mortis. See 3 COLUMBIA LAW REVIEW 125. Choses in action, where the delivery operates as an assignment, such as bonds, *Snellgrave* v. *Bailey* (1744) 3 Atk. 214; bills of exchange, *Edwards* v. *Wagner* (1898) 121 Cal. 376; promissory notes of third persons, *Veal* v. *Veal* (1859) 27 Beav. 303; deposit notes, *Amis* v. *Witt* (1864) 33 Beav. 619; mortgages, *Duffield* v. *Elwes* (1827) 1 Bligh N. S. 497; savings bank books, *Pierce* v. *Boston Savings Bank* (1880) 129 Mass. 425; certificates of stock, *Grymes* v. *Hone* (1872) 49 N. Y. 17; are enforceable as gifts causa mortis. But where the instrument delivered is an order to pay money, or a check, *Hewitt* v. *Kaye* (1868) L. R. 6 Eq. 198, or an ordinary bank book which is simply an evidence of indebtedness, *McGonnell* v. *Murray* (1869) I. R. 3 Eq. 46, there is not such an assignment as would operate as a valid gift causa mortis. A check or order not being an equitable assignment of a fund but the bank being merely an agent, the agency is revoked by the death of the testator. In re *Beak* (1872) L. R. 13 Eq. Cas. 489; Matter of *Smither* (1883) 30 Hun 632. If however the agency was executed by the collection of the check before the death of the donor, the gift causa mortis will be valid. *Frantz* v. *Porter* (1901) 132 Cal. 49. One departure however from strict principle seems to be recognized by the courts; when a check has been negotiated though not presented for payment before the death of the donor it is held to be a good gift causa mortis. *Rolls* v. *Pearce* (1877) L. R. 5 Ch. D. 730.